

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

FRED S. SILVERMAN  
JUDGE

NEW CASTLE COUNTY COURTHOUSE  
500 N. KING STREET, SUITE 10400  
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Submitted: March 2, 2006  
Decided: August 29, 2006

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*Re: Yellow Cab Delaware, Inc., City Cab of Delaware, Seaport Cab,  
Seacoast Cab, v. Department of Transportation, In the Matter of  
Elite Taxi Cab, C.A. No. 05A-02-012-FSS*

**Upon Appeal From the Department of Transportation's  
Decision Granting Elite Taxi Cab's Application for  
Taxi Medallions – *AFFIRMED***

*Re: Yellow Cab Delaware, Inc.,  
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Dear Counsel:

Appellants challenge the Department of Transportation's January 26, 2005 decision approving Elite Taxi's application, pursuant to 2 *Del. C.* Chapter 18, to transfer one taxi medallion and to receive four additional medallions. Elite has moved to dismiss because Appellants failed to name Elite in the appeal. The court sees past that problem and affirms the Department's decision because it is legally correct and supported by the record.

## **I.**

The parties to the Department's administrative proceeding were the applicant, Malik K Awan t/a Elite Taxi Cab, Inc., and five rival cab companies, which filed formal petitions of intervention: Seacoast Cab, City Cab, Yellow Cab, Noni Cab and Orville McFarland. As mentioned, the Department ruled for Elite on January 26, 2005. So, on February 25, 2005, three of the intervenors, Yellow Cab, City Cab and Seacoast Cab, along with Seaport Cab, filed a Notice of Appeal with the Prothonotary. Along with submitting their initial complaint for citation on appeal, Appellants summoned the Department through its secretary, but they failed to summon Elite, Noni and McFarland.

Appeals from the Department's final orders, such as the one here, are governed by 2 *Del. C.* §1819 and Superior Court Civil Rules 15 and 19. Two *Del. C.* §1819(a) provides, in part:

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The appeal shall be filed with the Prothonotary of the Court and summons in the appeal shall be served upon the Secretary of the Department . . . , and shall be served upon all other parties to the proceeding below, other than the appellant.

Therefore, because Appellants failed to summon the other original parties, especially Elite, they failed to perfect the appeal. That moves the analysis to the question whether the oversight is remediable.

Before moving on, the court emphasizes that Appellants filed a timely appeal. This case concerns Appellants' failure to summon an indispensable party, Elite. The court also observes that Elite has intervened, although it has attempted to limit its appearance.

If this were an appeal to the Supreme Court, *State Personnel Comm'n v. Howard*<sup>1</sup>, would apply, and the court would consider whether Appellants established that their omission did not cause substantial prejudice to Elite. That question was litigated here, and Appellants met their burden. Appellants showed that, anticipating a favorable ruling, Elite purchased new taxis and lined-up additional drivers before the Department's favorable decision. All that happened in the five

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<sup>1</sup> 420 A.2d 135, 136-137 (Del. 1980). See also *Di's, Inc. v. McKinney*, 673 A.2d 1199 (Del. 1996); *Preston v. Bd. of Adjustment*, 772 A.2d 787 (Del. 2001), citing with approval *Riedinger v. Bd. of Adjustment of Sussex County*, 2000 WL 33114345 (Del. Super.) ; *Kent County Levy Court v. Vincent*, 1984 WL 484487 (Del. Super.).

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months between the decision and when Appellants notified Elite, was that Elite started carrying fares in its new fleet. If the Department's decision is reversed, that will cost Elite whatever goodwill it built up in the five months, but little else. That does not amount to substantial prejudice.

*Howard* vindicates the courts' strong, well-established preference for hearing cases' merits and for not turning away worthy claimants due to technicalities. While failing to file a timely appeal is fatal because the time for taking an appeal is jurisdictional, modern courts consistently treat a defective filing differently. The question, therefore, is whether *Howard* and its legions apply to the administrative appeal here. They do.

The only authority Elite can cite to the contrary is *Sussex Medical Investors, L.P. v. Delaware Health Resources Board*<sup>2</sup>, which dismissed, under Superior Court Civil Rules 15 and 19, a timely appeal because the appellants failed to name an indispensable party. *Sussex Medical Investors* was cited with approval and discussed in *Hackett v. Board of Adjustment*<sup>3</sup>. Like *Sussex Medical Investors* before it, *Hackett* recognized the "possible tension" between *Howard*'s admonition "that appeals should be decided on their merits," and recognizing that "failure to name an indispensable party to an appeal from an administrative agency to the

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<sup>2</sup>1997 WL 524065 (Del. Super.).

<sup>3</sup>794 A.2d 596, 598 (Del. Super. Ct. 2002).

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Superior Court is not an amendable defect.”<sup>4</sup>

In analyzing and resolving the *Howard – Sussex Medical Investors’* tension in favor of dismissal, *Hackett* calls attention to “the strictures of appeals implicated by the *certiorari* process in the Superior Court.”<sup>5</sup> This appeal, however, does not concern those strictures. Thus, there is no principled reason for the court to favor an inflexible approach over the long string of modern authority allowing amendment to add a party to a timely administrative appeal, if the appellant demonstrates that the appellee has not been prejudiced by the oversight.

## **II.**

### **A. Elite Made Its Case for Five Medallions.**

Substantively, Appellants conceded at the hearing, and they do not dispute, that Elite met all the technical requirements for receiving the medallions, e.g. proper titles, insurance, good character, financial ability. Appellants argue instead that Elite failed to present substantial evidence, as required by 2 *Del. C.* §1802(e)(1)a, proving that “the proposed operations will serve a useful public purpose, a useful public necessity and a useful public convenience responsive to the public demand.”

Primarily, Appellants challenge the weight and credibility of Awan’s “purely anecdotal,” “unsubstantiated” testimony supporting the finding that Elite “has clients in need of transportation services throughout New Castle County.”

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<sup>4</sup>*Id.* at 598.

<sup>5</sup>*Id.*

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Furthermore, Appellants testified, also anecdotally, and disparaged Awan's projections. Appellants focus mostly on Elite's failure to present "objective evidence of market conditions to support [Elite's] position."

The hearing was, at times, informal with back-and-forth between the rival owners. And, as Appellants argue, no one presented objective testimony about the public's need and convenience. Nevertheless, there is no current requirement that new medallions must be justified through market studies, pending legislation to that effect notwithstanding. As long as it was credible, the hearing officer could rely on Awan's testimony.

Awan testified that he has been in the business 15 for years. He owned and operated one taxi cab. "Sometimes two or three people call at the same time," and he can not respond with his single car. "A lot of people call." Sometimes Elite takes people to and from Delaware's beaches, including people who have been drinking. Elite also would service Wilmington law firms, who enjoy his service. He knows the entire Chase building, "how they are coming and from what office."

Elite intended to serve the public with newer equipment, including a "1-800 number." Through its limousine, "the best car in this area," Elite provides the "best service." According to Awan, the public needs "nice car, nice service." Elite also intends to make a "web site" and uses the latest credit card system. Meanwhile, Elite cannot meet the demand at the Wilmington train station or serve Newark with a single taxi.

To the court, taken as a whole, Awan's testimony was unsophisticated and somewhat sketchy. The fact-finder, however, was a Department of

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Transportation hearing officer. He is better trained and more experienced in evaluating the sort of testimony Elite presented through its owner, Awan. The court will not reject the hearing officer's conclusion, based on all the testimony, that, more likely than not, giving Elite the medallions serves the public's need and convenience.

**B. Appellants Failed to Prove an Adverse Impact on the Public or Them.**

Under 2 *Del. C.* §1802(e)(2), once an applicant has shown a need for medallions, as presented above, the burden of proof shifts to the existing carriers to:

prove by a preponderance of the evidence that the applicant's operation will have a significant adverse impact on the public health or safety or an adverse impact on existing carriers such as to impair their ability to serve the public.

Appellants proved, through their anecdotal testimony, that many more medallions have been issued than are in use. One competitor testified that he was using "less than half of [his] forty-eight medallions." That, however, does not establish that giving Elite four new medallions would have a significant impact on the public or Appellants.

Appellants testified, generally, that it is getting harder to make a profit through a taxi cab business. "There are too many taxicabs operating and competing for a limited number of passengers. . . . The public does not need any additional taxicab operators competing for their business." Another competitor testified, "The industry is steadily going down and it's a struggle for us to make a living. . . ."

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Another testified:

[Elite's] medallions being put on the road would adversely affect [the competitor] in a financial way and would eventually deteriorate to the point where it would come around to affecting the public.

Yet, another competitor vaguely referred to “constantly getting calls from the public on price gauging issues . . . and not just from [that competitor's] drivers but actually other companies.” Again, the fact that the industry has become competitive, does not prove significant adverse impact from the medallions at issue.

Moreover, several competitors testified that they would be satisfied if Elite would obtain its medallions from their stockpiles of unused medallions. In the final analysis, they were not concerned about increased competition, so long as the new competitor went through them. As one competitor put it, “[Elite] can buy existing medallions that I have in New Castle County.”

In summary, the record shows that until 1991, the taxicab business was “closed entry.” Since then, the requirements were “softened,” and more medallions have been issued than are being used. Unused medallions are not being turned-in, and there is reason for concern about over-competition. The General Assembly created a task force that looked into the situation, and legislation is pending. Meanwhile, however, under prevailing standards, the hearing officer was justified to believe that giving five medallions, one transfer plus four new ones, is not likely to have a significant adverse impact on the public or the existing operators.



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**III.**

For the foregoing reasons, Appellees' motion to dismiss is **DENIED** and the decision of the Department of Transportation's January 26, 2005 decision granting Elite's application is **AFFIRMED**.

**IT IS SO ORDERED.**

Very truly yours,

FSS/lah  
oc: Prothonotary (Appeals Division)